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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-203

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "Odd-Lots" on the New York Stock Exchange similarly situated,

Petitioner,

—v.—

CARLISLE & JACQUELIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF AMERICAN COLLEGE OF TRIAL LAWYERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American College of Trial Lawyers respectfully moves this Court for leave to file a brief *amicus curiae* in this action pursuant to Rule 42 of the Rules of this Court. The consent of the attorneys for the petitioner and for the respondents, respectively, was requested but refused.

The American College of Trial Lawyers is a national organization of trial attorneys, each of whom is admitted to practice before the highest court in his state and has been engaged in trial practice for at least 15 years. Among

the objects of the College is "to improve and enhance the standards of trial practice [and] the administration of justice . . . ." *

In 1970, the American College of Trial Lawyers established a Special Committee on Rule 23 of the Federal Rules of Civil Procedure to evaluate the performance of Rule 23 as amended in 1966 and to recommend revisions to better effectuate the purposes of the Rule. At the time of that amendment it was widely recognized that the impact of the amended Rule could not be accurately predicted, and that the Rule was an experiment to be tested in the crucible of the courtroom.** Evaluation of the practical effectiveness of the Rule necessarily awaited actual litigation involving its application. The Special Committee's assignment was to make such an evaluation on behalf of and report to the American College of Trial Lawyers.

The members of the Special Committee are experienced trial attorneys who practice in major centers of commercial litigation and are deeply involved with the day to day application of Rule 23. On March 15, 1972, the Special Committee issued its report and recommendations which were approved by the Board of Regents of the American College of Trial Lawyers.*** The *Report* proposed revisions of Rule 23 which were designed as further steps towards the Rule's as yet unrealized goals of economy in judicial administration and uniformity of result without sacrifice of proced-

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* Article II, By-Laws of the American College of Trial Lawyers.

** Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98, 102-03 (1966).

*** American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972).

ural fairness. It is the continuing interest of the American College of Trial Lawyers in those goals that has prompted the filing of this motion; and it is this point of view which the College seeks to present in its *amicus curiae* brief.

The American College of Trial Lawyers respectfully requests the leave of this Court to file a brief *amicus curiae* to present the considerations of broader policy with which, through its exhaustive examination of the performance of Rule 23, it has become particularly concerned.

Respectfully submitted,

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December 28, 1973

* Members of the Committee on Rule 23 and Multidistrict Litigation of the American College of Trial Lawyers.

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BRIEF AMICUS CURIAE OF AMERICAN COLLEGE OF TRIAL LAWYERS

Questions Involved

The American College of Trial Lawyers will address itself in this brief *amicus curiae* to the following questions only:

1. Was the Court of Appeals correct in holding that this class suit was unmanageable and could not be transformed into a manageable action by the imposition of a "fluid" dollar judgment which, in large part, would not be dis-

tributed to individual members of the class to compensate them for damages allegedly suffered by them?

2. Do Rule 23 of the Federal Rules of Civil Procedure and the Fifth Amendment to the Constitution of the United States require that actual notice of a class determination pursuant to Rule 23 be given to those individual members of the class whose names and addresses are known, and did the Court of Appeals hold correctly that, ordinarily, such notice must be given at plaintiff's expense?

I.

The action is wholly unmanageable as a class suit and cannot be transformed into a manageable action by unacceptable notions of "fluid class recovery."

Rule 23, promulgated by this Court in 1966, was bottomed upon considerations of sound judicial administration and the "fair and efficient adjudication of the controversy."* Thus the trial court in any class suit must focus at the outset upon "the difficulties likely to be encountered in the management of a class action." The Rule explicitly so provides in paragraph (b) (3) (D).

In drafting the Rule, this Court's Advisory Committee recognized that a preeminent purpose was the concentration in a single forum of multitudinous claims which otherwise would be litigated separately in many state and federal courts. Advisory Committee's Note, 39 F.R.D. at 104.

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* Rule 23(b)(3) of the Federal Rules of Civil Procedure; *see* Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98, 102-03 (1966) (hereinafter cited as the "Advisory Committee's Note").

That preeminent purpose of the Rule would not be served here and petitioner cannot claim otherwise. As the District Court found, the interest of individual class members in any potential recovery

> " . . . is sufficiently small so that the benefits of individual recovery are not worth the price of litigating individual claims." (A216)

In other words, were it not for the expansive interpretation given to Rule 23 by the District Court, no federal court would ever be burdened with the massive and complex claims which are now before this Court, seeking individually miniscule damages for millions of unidentified persons. We submit that it was never this Court's purpose to add such monumental burdens to the dockets of the federal courts or to convert the federal district courts into small claims courts.*

The findings of the District Court permit no doubt that the burden which petitioner would lay upon the federal judicial system would transcend any conceivable level of tolerance and would indeed be impossible to discharge. The plaintiff class would consist of approximately 6,000,000 people, residing throughout the world, who bought or sold securities in odd-lots on the New York Stock Exchange over the four-year period from May 1962 through June 1966. The average class member had approximately five odd-lot transactions during the four-year period for which

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* "** [T]he public interest may well be so insignificant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering. Our scarce federal judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every wrong, however slight." *Hackett* v. *General Host Corp.*, 455 F.2d 618, 626 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

the court below estimated that the aggregate illegal overcharge, if any, would be approximately $1.30 and the average recovery by an individual member of the class after trebling would be approximately $3.90.* (A353-54; *see also* A 218 n.8)

Bearing in mind that petitioner has exercised his constitutional right to demand trial by jury, each and every class member who had not elected previously to be excluded from the class would be required to prove to a jury that he effected odd-lot transactions on the New York Stock Exchange at times when the odd-lot differential was unlawfully fixed by the respondents.** At the very least, each member of the class would be required to prove each of his odd-lot transactions and the dollar amount of the odd-lot differential paid by him. No claimant ordinarily would know which odd-lot dealer executed his transaction (*see* A111-12), and the requisite proof is not available in the books and records of the respondents (A215); each claimant would probably be compelled to subpoena the records of the stockbroker who, on his behalf, forwarded his odd-lot order to one of the two respondent odd-lot dealers who are named as defendants in this action (A111; *see also* A37-38, A41-42, A45-46, A51-52, A54-56, A57-58, A61-62).

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* At the outset of the litigation, the maximum recovery, trebled, by the members of the alleged class was projected at $60,000,000 (A218), or an average of $10 for each of the 6,000,000 class members. Petitioner now asserts that this "estimate is somewhat conservative" and that the "maximum damages may be as much as $120 million" (Petr.'s Br., p. 42 n.23), thereby increasing the average claim to $20.

** *See, e.g., Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 476 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494 (1931); *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961); *Sablosky* v. *Paramount Film Distrib. Corp.*, 13 F.R.D. 138, 140 (E.D. Pa. 1952).

It is readily apparent that even after a protracted trial of the complex antitrust and regulatory issues affecting the class as a whole, the trial court would be confronted with an assignment so massive that it could not possibly be discharged. Even if we assume that only 100,000 of 6,000,000 potential claimants come forward to press their claims and assume further that a trial judge and jury could adjudicate four claims each day, five days each week for 52 weeks each year, the claims could not be determined in a manner consistent with the Constitution in much less than 100 years.* The burden would be im-

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* "In theory and in an initial off-hand reaction, it is tempting to say: why not let everyone who asserts a somewhat related grievance come into a common arena to resolve their controversy? However, on a moment's reflection, it should be apparent that the capacities of judges and jurors to absorb the factual situations thus presented are finite and that courthouses are not coliseums." *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

"Parenthetically, the notion of utilizing a jury trial in a class suit containing the varied problems certain to abound herein, is enough to chill any further discussion of the required superiority of a class claim over other available methods for the fair and efficient adjudication of the controversy. Such a trial, whether one trial or the multiple mini-trials probably required, would withdraw from all other usefulness for years to come the federal judicial personnel involved. Where one could muster jurors willing to devote themselves so indefinitely in time from their accustomed tasks, is puzzling. And one might relevantly ask—what public interest would be served by devoting the public's facilities in this way and what just purpose requires such a colossal marshalling of judicial resources and their supporting personnel?" *Schaffner* v. *Chemical Bank*, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

See also Hettinger v. *Glass Specialty Co.*, 1973 Trade Cas. ¶ 74,487, p. 94,164 (N.D. Ill. 1973); *Cotchett* v. *Avis Rent A Car System, Inc.*, 56 F.R.D. 549, 553 (S.D.N.Y. 1972) (Tyler, J.).

possible even under the more informal procedures of the small claims courts.*

To say that such a case is "manageable" is nothing less than delusion. Equally deluding is the argument that the trial court should first concern itself with the adjudication of "common" class issues such as liability and only later worry about such matters as individual jury trials for claimants who seek to prove injury. *See City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45, 71-72 (D.N.J. 1971); *Morris* v. *Burchard*, 51 F.R.D. 530, 536 (S.D.N.Y. 1971); *Harris* v. *Jones*, 41 F.R.D. 70, 73 n.5 (D. Utah 1966). The case could become "manageable" only by impermissible recognition that the office of Rule 23 is to force defendants into settlements in order to avoid interminable litigation and potentially ruinous exposure.

Recognizing that here "the benefits of individual recovery are not worth the price of litigating individual claims" (A216), the District Court attempted to transform the case into a manageable action by blue-printing a "fluid class re-

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* In the year ended June 30, 1972, the Small Claims Part of the Civil Court of the City of New York disposed of 57,214 claims. Of that number, 13,282 claims were tried and 2,272 were settled during trial. *Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1971 through June 30, 1972*, p. A97 (N. Y. Legislative Document No. 90, 1973). Each of the approximately 120 judges of the Civil Court sits from time to time in the Small Claims Part. Sessions are held in the evening hours throughout the year, except for Christmas week and holidays, at six locations in New York City. Civil Court judges preside at these locations at approximately 850 sessions per year and are assisted in the disposition of cases by 39 members of the bar, who serve without compensation as arbitrators (Letter to Mr. Marvin Schwartz dated December 17, 1973 from the Honorable Edward Thompson, a Justice of the Supreme Court of the State of New York who serves as Administrative Judge of the Civil Court of the City of New York).

covery" which, so far as we know, has never been adopted by any District Court in any adversary proceeding under Rule 23.* This was the procedure which Judge Medina, speaking for the Court of Appeals, found to be "fantastic". As Judge Medina said (A370),

> "We hold that the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."

Certainly in this respect the Court of Appeals was entirely correct.

Aside from all its other vices, a "fluid class recovery" would *not* solve any manageability problem. As the District Court described the procedure to be followed, those members of the class who elected to do so would be permitted to prove their individual claims to a jury. Individual claims would be satisfied to the extent they were proved, but "a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the Court until such time as the fund is depleted" (A217). As we have already observed, the adjudication of individual damage

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* *Cf. In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281, 287-89 (S.D.N.Y.), *mandamus denied, sub nom., Pfizer, Inc.* v. *Lord*, 449 F.2d 119 (2d Cir. 1971). Relying primarily upon the District Court's decision in this case, the District Court in that case tentatively concluded that use of a "fluid class recovery" to minimize the manageability problems inherent in individual proof of damages was not constitutionally proscribed and *might* prove to be feasible. However, the District Court in the *Antibiotic Drugs* case did not hold—as did the District Court in this case—that any unclaimed funds could be employed to reduce future prices, or for some other "public purpose" benefiting the members of the class, but reserved decision as to the proper disposition of those "unclaimed funds" (and indicated that the defendants might not be permitted to "retain" those funds). *Id.* at 282-83, 287.

claims would be impossible even if only 100,000 out of 6,000,000 potential claims were filed (*see supra* at 5-6).

Further, the District Court erroneously contemplated "a future reduction of the odd-lot differential in an amount determined reasonable by the Court until such time as the fund is depleted" (A217). We submit that the regulatory scheme for stock exchanges prescribed by Congress in the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, puts entirely beyond the power and jurisdiction of the federal courts the fixing, in the guise of a forced prospective reduction, of the "reasonable" charges for stock exchange transactions.

Section 11(b) of the Exchange Act, 15 U.S.C. § 78k(b), gives to the Securities and Exchange Commission, but not to the federal courts, sweeping authority over stock exchange rules governing odd-lot dealers. Even more specifically, Section 19(b) of the Exchange Act, 15 U.S.C. § 78s (b), empowers the Commission to impose rules upon the stock exchanges with respect to "the fixing of reasonable rates of commission, interest, listing and other charges" and with respect to "odd-lot purchases and sales". The Commission is empowered so to act when "necessary or appropriate for the protection of investors." Congress has thus directed that it is for the Commission, rather than for the courts, to determine in the first instance the reasonableness of charges made by odd-lot dealers for transactions executed on an exchange.

We do not address ourselves to the apparently conflicting contentions of the parties as to whether the Commission has in fact exercised its ample authority to fix odd-lot differ-

tials. Suffice it to say, however, that the notion of "fluid class recovery" would intrude the courts, time and time again, into areas in which their competence is questionable. As Congress and state legislatures have recognized by a variety of regulatory statutes so numerous as to make citation superfluous, price regulation and determinations of "reasonable" rate levels are legislative and administrative functions for which courts are singularly ill-suited. *See Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 50-53 (1936); *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *Columbus Gas & Fuel Co.* v. *City of Columbus*, 42 F. Supp. 762, 768 (S.D. Ohio 1941). Nothing in Rule 23 suggests that one of its imperatives is the intrusion of the federal courts, in the name of "fluid class recovery", into price regulation for the securities, transportation, energy, communications, credit, banking and a host of other industries.

The more basic vice of "fluid class recovery" as a device to make "manageable" that which is "unmanageable" is that through the use of a procedural rule, substantive law is changed by imposing "damages" where no damage or injury has been proved.* Thus the District Court in this case seemed prepared to impose a liability of perhaps $60,000,000 even if not a single class member, other than Eisen, came forward to prove injury and damages. The

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* The Rules Enabling Act, 28 U.S.C. § 2072, provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." In *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), this Court rejected a similar attempt to distort section 4 of the Clayton Act, emphasizing that recovery of treble damages is available only to those who prove that they sustained actual injury to their business property.

imposition of such liability is prohibited by section 4 of the Clayton Act, 15 U.S.C. § 15, which permits the recovery of damages only by persons injured in their business or property; absent proof of injury to business or property by individual class members, there could be no basis for the imposition of liability. While section 16 of the Clayton Act, 15 U.S.C. § 26, authorizes private injunction suits for violations of the antitrust laws, it is patently specious to suggest (Petr.'s Br., p. 51-52) that Congress intended that the Courts might award damages in injunction suits in circumstances where damages are not permitted under section 4. *See Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916).

No more should a procedural rule be applied to enlarge statutory regulatory schemes by providing new forms of deterrence or an added punishment not provided by Congress. It is not a novel principle of law that damages are to be awarded only upon proof of injury. That principle is as applicable to tort and contract litigation in general as it is to claims brought under the antitrust laws. *See* RESTATEMENT (SECOND) OF TORTS § 12A (1965); RESTATEMENT OF CONTRACTS § 326 (1932); C. MCCORMICK, DAMAGES §§ 1, 148-49 (1935).*

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* As the court below correctly noted (A357-58), *Daar* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732 (1967), does not provide "respectable precedent" for the "fluid class recovery" notion: that decision expressly recognized that each class member would ultimately be compelled to prove his damages, and the so-called "fluid class recovery" eventually adopted was the result of a ***settlement*** in which the defendant agreed to adjust the meters in its cabs so as to reduce the fare for future cab users.

The court in *Daar* merely held that the difficulties inherent in individual proof of damages by the class members was only "one factor to be considered" in determining whether a proposed class action satisfied the vague standards of section 382 of the California Code of

We submit that Rule 23 does not permit and was not intended to permit a roving commission in search of wrongdoing and the imposition of liability without proof of either injury or damage.

As one distinguished judge has said of Rule 23,

> "Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multimillion dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrongdoing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

Civil Procedure. 67 Cal. 2d at 713, 433 P.2d at 745. In marked contrast to the particularized criteria set forth in Rule 23, the California class action rule merely provides, in pertinent part: "when the question is one of a common or general interest of many persons or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." As is apparent from even a casual reading of the "Manual for Conduct of Pretrial Proceedings on Class Action Issues", promulgated by the Superior Court of the State of California for the County of Los Angeles, annexed as Appendix A to the *amicus* brief filed by the California Trial Lawyers Association, the procedures and considerations applied under the California class action rule are "very different" (A358) from those specified under Rule 23.

The "urgent attention" which Judge Friendly directs is not a matter for the courts. We would not suggest that large scale consumer frauds, where many individuals are mulcted in small amounts, should go unpunished or that those damaged should be left without a remedy. Nor would we be heard to say that class actions are inappropriate in environmental or civil rights cases, in most of which the proper remedy is an injunction. However, we respectfully submit that it is for the Congress and the Congress alone to determine what the remedies, if any, in such cases should be. We submit that Rule 23 should not be perverted to achieve a result which we believe this Court never intended and which was certainly not apparent to Congress when amended Rule 23 was laid before it.

II.

Individual notice must be given to each class member whose name and address can be determined, and, ordinarily, a plaintiff must initially bear the expense of providing notice to the class.

Class action procedures are an exception to one's fundamental right to control litigation affecting his own legal rights, an exception which "can be tolerated, if not completely justified, only if there is fealty to both the spirit and letter of the procedural rules, including those relating to notice."* Nor can defendants fairly be subjected to the huge expense of class suits unless there is strict observance in each case of the due process requirements essential to

* *Greenfield* v. *Villager Indus., Inc.*, 483 F.2d 824, 831-32 (3d Cir. 1973).

ensure that the judgment will bind all members of the class.*

In its initial determination of the class action issues in this case, the District Court held that "both the Rule and concepts of due process require individual notice for class members who can be identified" and, inferentially, that the plaintiff would be required, at least initially, to bear the expense of providing the requisite notice (A101).

The District Court's subsequent decisions to the contrary (A199, A275) seem attributable to its misunderstanding of the Court of Appeals' opinion which accompanied the reversal of the District Court's initial denial of class action status (A110). In any event, the District Court's ultimate decision that actual notice need not be given even to class members whose names and addresses are known was clearly prohibited by Rule 23 itself and is incompatible with the due process requirements of the Fifth Amendment.

The federal courts have consistently and correctly held that actions cannot be maintained as class suits under either subdivision (b)(1) or (b)(2) of the amended Rule 23 if they seek exclusively or primarily to recover money damages on behalf of persons having no common tie other than their interest in a predominating question of fact or law. *See, e.g., Free World Foreign Cars, Inc.* v. *Alfa Romeo S.p.A.*, 55 F.R.D. 26, 29-30 & n.9 (S.D.N.Y. 1972); *Goldman* v. *First Nat'l Bank*, 16 Fed. Rules Serv. 2d 840, 845-46 (N.D. Ill. 1972); *see generally* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01 [10. -3], p. 23-29 (2d ed. 1969). It seems incontrovertible, as both the District Court (A95) and the

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* *Greenfield* v. *Villager Indus., Inc., supra* at 831; M. Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 Antitrust L. J. 295, 297-98 (1966).

Court of Appeals (A121) held in this case, that a private treble damage action under the federal antitrust laws can be maintained as a class action, if at all, only if it satisfies the prerequisites of Rule 23(b)(3).

Rule 23(c)(2) expressly provides that individual notice must be given to each prospective member of a (b)(3) class "who can be identified through reasonable effort." This Court has repeatedly held that due process requires individual notice to those whose names and addresses are known if an adjudication of their legally protected interests is to be binding upon them and that as to such persons, mere notice by publication is insufficient. *Schroeder* v. *City of New York*, 371 U.S. 208, 212-13 (1962); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950). The notice provisions of paragraph (c)(2) were designed by the Advisory Committee to fulfill those requirements of due process so that a judgment in a (b)(3) class action—unlike a judgment in the predecessor "spurious class action"—could constitutionally be made binding upon the absent members of the class. Advisory Committee's Note, 39 F.R.D. at 107.

Apparently overlooked by petitioner, and in the *amicus curiae* briefs filed in his support, is that amended Rule 23 may be applied to a *defendant* class; it is not limited to a plaintiff class. In considering the requirements of due process, would any court or any responsible lawyer assert that if the tables were turned, and if a multitude of individuals and corporations (including many who reside in foreign countries), whose names and addresses are known, were named as a *defendant* class, that actual notice to only a sampling of those defendants and publication in five

newspapers would satisfy due process requirements, and that a judgment against the class would be binding and enforceable against each of the defendant class members? While there may be circumstances in which Rule 23 and due process would not require an extraordinary expenditure of effort and expense to *identify* individual class members, individual and actual notice is mandatory when, as here, names and addresses are in fact made available by one of the parties.

High constitutional principle is demeaned by the cynical argument that notice pursuant to paragraph (c)(2) is unimportant in this case because no rational person, whatever the reason, would wish to assert an individual claim (Petr.'s Br., p. 32).* Notice of a class determination serves other and perhaps more important functions than merely providing an opportunity to opt-out and prosecute an individual claim; notice is indispensable to the fair and efficient adjudication of a class action.

The adequacy of the representation afforded the absent class members by the plaintiff is, as petitioner puts it, "the hallmark of due process" (Petr.'s Br., p. 30), and Rule 23 accords to each member of a (b)(3) class the right to determine that question for himself. Each member of the

* The absence of individual notice to all identified class members cannot be justified in this case, as petitioner suggests (Petr.'s Br., pp. 31-32), on the grounds that the statute of limitations has expired. Plaintiff has not disclaimed any intent to amend his complaint to seek damages for the period subsequent to the commencement of this action, nor has he disclaimed future reliance upon the doctrine of "fraudulent concealment" to toll the statute of limitations. Nor could he appropriately do so consistently with his obligation to protect the potential claims of those he seeks to represent, absent notice to the members of the class that petitioner was, or sought to be, their representative.

class has the right to consider the adequacy of his representation in determining whether to remain a member of the class and, also, in determining whether to appear individually, or with other like-minded class members, through counsel of his or their own choosing and actively participate in the prosecution of the case. *Greenfield* v. *Villager Indus., Inc., supra* at 833; *cf. Mullane* v. *Central Hanover Bank & Trust Co., supra* at 314; *Arey* v. *Providence Hospital*, 55 F.R.D. 62, 71 (D.D.C. 1972). The consequence of denying each class member that right might well be to render the resulting judgment unenforceable against him, *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and would frustrate the purpose of the amended Rule 23 to eliminate the problems of "one-way intervention" which made the former rule so inequitable and ineffective. Advisory Committee's Note, 39 F.R.D. at 105.

Class actions should be so administered by the District Court that class members are given full opportunity to evaluate the adequacy of their representation and they should be encouraged to undertake such a function.* It is not the function of the District Judge to goad the class representative and his counsel to an adequate standard of performance; even a District Judge with all the wisdom of a Solomon would find it difficult to do so without creating the impermissible impression that the Court was more the champion or advocate of the class than an impartial tribunal for the fair adjudication of the controversy.

We do not suggest that the initial notice could or should contain all of the information necessary for appraisal by

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* *See Air Lines Stewards Local 550* v. *American Airlines, Inc.*, 455 F.2d 101, 108 & n. 17 (7th Cir. 1972); *Arey* v. *Providence Hospital, supra. But cf. Gonzales* v. *Cassidy*, 474 F.2d 67, 76-77 (5th Cir. 1973).

laymen of the adequacy of representation. But at the very least, the notice must inform the class member that a lawsuit is pending which will adjudicate his rights unless he elects otherwise, give him the opportunity to follow the litigation and permit him or his counsel to determine then or later that, for example, the interests of certain members of the class are so different that sub-classes represented by separate counsel should be created, or that additional counsel (or claimants) are necessary to protect the interests of some or all of the class. It strains credulity too far to suggest that counsel for the plaintiff will be alert to such differences in interest and will make such proposals to the Court when the effect would be to reduce drastically his counsel fees in the event of settlement or recovery.

A failure to provide individual notice to all identifiable class members at the outset of the litigation equally undermines the objective of Rule 23 to avoid multiplicity of suits through an adjudication in a single forum which is binding upon all members of the class. The inadequate notice ordered by the District Court in this case would expose the parties to subsequent challenges to the binding effect of the judgment by dissatisfied class members after years of expensive litigation had been concluded. In reality, the District Court would have sanctioned a return to the discredited practice of "one-way intervention": if the defendants are held liable, the class members can accept the benefits of that decision; but if defendants prevail, or the scope or amount of liability is deemed inadequate, the absent class members might have a ready vehicle for challenging the judgment.

We submit that Judge Medina correctly concluded that the District Court's proposal to give individual notice to

less than .3 of 1% of the class members whose names and addresses were known, and otherwise to rely upon notice by publication, was "a totally inadequate compliance with the notice requirements of amended Rule 23" (A353).

Even if this action could properly be maintained as a class action under subsections (b)(1) or (b)(2), as petitioner asserts (Petr.'s Br., p. 36)—a conclusion with which we do not agree (*see supra* at 13-14)—it is unthinkable that the rights of absent parties could be adjudicated without their knowledge when their names and addresses are known. For example, where injunctive or declaratory relief is sought which could affect thousands of people in significant ways, surely those who would be affected must be given the opportunity to shape the presentation of their case or express their views as to the precise nature of the relief requested. It would be naive to assume that one private plaintiff or organization can discern what is best for and desired by all. The claimed beneficiaries of the litigation might well have divergent interests as to the precise corrective action which should be required. Those whose lives or rights will be affected deserve an opportunity to be heard if they so desire.

Petitioner and some of the *amici* who support him appear to misunderstand the Court of Appeals' decision as to which party should ordinarily bear the expense of giving notice to the class. The panel did *not* hold that in every case, regardless of the circumstances, the plaintiff must bear the expense of notice (*see* A351 & n.5). All the Court held is that ordinarily the expense of notice must be advanced by the party who initiated the class action, particularly if he is unwilling or unable to post a bond sufficient to insure that his adversary will be reimbursed for the expenditure if the

adversary ultimately prevails on the merits. The District Court here assessed ninety per cent of the cost of notice against the defendants, even though it was undisputed that the amounts so assessed would not be recoverable should the defendants ultimately prevail. Patently, this would be an unjustifiable seizure of the defendants' property without due process of law.

In the final analysis, petitioner's contention is that defendants should be required to finance litigation against themselves. Nothing in the Rule or in its history in any way suggests that such was this Court's intention or that this could be considered an acceptable method for the fair adjudication of a controversy.

III.

Conclusion.

As Judge Medina observed, expansive interpretations of the amended Rule 23 in the lower federal courts have had the result that "[c]lass actions have sprouted and multiplied like the leaves of the green bay tree." (A371)

In early 1971, a Special Committee of the American College of Trial Lawyers undertook to examine docket entries in all 29,693 cases brought in the United States District Court for the Southern District of New York during the five and one-half years from July 1966 to the end of 1971.*

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* Commencing only recently, and since June 30, 1972, the Administrative Office of the United States Courts has been collecting statistics on class actions. Those statistics reveal that a total of 2,654 class action litigations were filed during fiscal year 1973 (151 in the Southern District of New York) and there was a total of 3,756 such cases pending in all of the federal district courts (523 in the Southern District of New York) as June 30, 1973. 1973 Annual Report of the Director, Administrative Office of the United States Courts, pp. II-42 to II-49, Tables Nos. 36-38 (Prelim. Report).

That examination confirmed what bench and bar had already recognized out of their daily experience: Amended Rule 23, as applied in the lower courts, has imposed a crushing burden upon the federal judicial system.

Examination of docket entries in the Southern District of New York identified 1,339 class actions brought during the five and one-half year period, of which 410 were brought in 1971.* The burden upon the courts is far greater than mere numbers would indicate, for class actions tend to be complex and protracted antitrust and securities cases which demand disproportionate attention. Attempts by plaintiffs and their counsel to represent massive classes have become increasingly common. Thus, complaints have been filed on behalf of all subscribers to business telephones in New York County, all credit card holders similarly situated, all consumers of gasoline in a given state or states, all home owners in the United States and even all people in the United States.**

Moreover, the experience of both bench and bar in many massive class actions has confirmed Judge Lumbard's conclusion (in dissent from the initial decision of the Court of Appeals in this case) that all too often, "the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them" (A134).***

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* The number of class actions identified by examination of docket entries is substantially less than the number actually brought, since a class action would not be so identified on the docket unless a motion had been filed relating to class action status. American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure* 13 (1972).

** *Id.* at 6.

*** Experience suggests that many of the class members on whose behalf class actions are purportedly brought have little or no interest

The view of Rule 23 espoused by petitioner and the *amici* who support him would add intolerably to the present workload of the District Courts and would do so at the expense of injustice to litigants who would become embroiled in these monstrous cases. Contrary to the assertions made by several of the *amici* who support petitioner, the decision of the Court of Appeals would not affect in any significant way the efforts of those who seek by litigation to vindicate the civil rights of the underprivileged. After all, this Court's

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in asserting their claims even after settlement when they can share in the recovery merely by filing a simple proof of claim form. The realities of class action damage litigation have thus, as Judge Weinfeld recently observed, raised a substantial question as to whether the Rule "has really achieved its promise, or rather whether it has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees." *Free World Foreign Cars, Inc.* v. *Alfa Romeo S.p.A., supra* at 30. For example, in *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, 1384-85 (S.D.N.Y. 1972), written notice of the settlement was mailed to 89,000 class members, but only 14,156, or 15%, replied. However, counsel for the class representative sought attorneys' fees of $2.5 million, and was awarded $1.5 million. *Id.* at 1390, 1392. Similarly, a review of the docket in *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971), reveals that notice of the settlement was sent to 21,291 non-governmental class members, but only 1,716 responded: 976 of those persons opted out of the class and only 740 (or approximately 3%) of the class members filed claims. Notice was also sent to 1,045 governmental bodies of which approximately 8% filed claims, 231 opted out and the others did not respond. In fact, 414 governmental agencies which could have shared in the settlement fund without even filing a claim notified the District Court that they did not wish to participate. Despite the lack of interest in the litigation demonstrated by the members of the class, the attorneys for the class were awarded fees of $6 million. *See also Lindy Bros. Bldrs., Inc.* v. *American Radiator & Standard Sanitary Corp.*, 341 F.Supp. 1077 (E.D. Pa. 1972) (attorneys' fees of approximately $2.2 million received by the class representatives' counsel in connection with a $26 million settlement), *rev'd*, —— F.2d ——. Docket Nos. 72-1647/72-1648 (3d Cir. October 31, 1973); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969) (attorneys' fees of over $5 million received by the class representatives' counsel in connection with a $22,175,000 settlement).

landmark civil rights decisions were *not* rendered in class actions and did not depend in any way upon Rule 23.*

The Court of Appeals held correctly that the case was unmanageable, that it could not be transformed into a manageable action by any notion of "fluid class recovery" and that Rule 23 and the Fifth Amendment require actual notice, at petitioner's expense, to those members of the class whose names and addresses are known.

Respectfully submitted,

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* *E.g., Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Brown* v. *Board of Educ.,* 347 U.S. 483 (1954); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

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